

² The Board notes that, following the April 27, 2023 decision, OWCP received additional evidence. However, the Board’s *Rules of Procedure* provides: “The Board’s review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal.” 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

wage-loss compensation and Social Security Administration (SSA) age-related retirement benefits, without an appropriate offset; (2) whether OWCP properly denied waiver of recovery of the overpayment; (3) whether OWCP properly required recovery of the overpayment by deducting \$92.31 from appellant's continuing compensation payments, every 28 days; and (4) whether OWCP properly determined appellant's pay rate for compensation purposes, effective July 17, 2022.

FACTUAL HISTORY

This case has previously been before the Board on a different issue.³ The facts and circumstances of the case as set forth in the Board's prior decision and prior order are incorporated herein by reference. The relevant facts are as follows.

On June 8, 1990 appellant, then a 36-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that she sustained instability and subluxation of the C1 vertebrae due to factors of her federal employment. OWCP accepted her claim for exacerbation of os odontoideum (spina bifida) with C1-2 instability. It authorized a series of surgical procedures, with the most recent being a cervical fusion on May 3, 1998. Appellant subsequently returned to work in a part-time, limited-duty capacity.

On March 28, 2000 OWCP issued a formal loss of wage-earning capacity (LWEC) determination. It found that appellant's actual earnings as a part-time, modified clerk effective October 23, 1998 fairly and reasonably represented her wage-earning capacity. As such, OWCP adjusted her wage-loss compensation to reflect her part-time weekly wages of \$373.20. For several years thereafter, appellant continued to work in a part-time, limited-duty capacity while receiving wage-loss compensation based on OWCP's March 28, 2000 LWEC determination. She stopped working on June 9, 2003 and requested wage-loss compensation for total disability. OWCP continued to pay appellant for partial disability in accordance with the March 28, 2000 LWEC determination.⁴

On June 24, 2022 OWCP requested information from SSA regarding potential Federal Employees Retirement System (FERS)/SSA dual benefits.

OWCP thereafter received a completed FERS/SSA dual benefits form from SSA dated July 13, 2022. The form indicated that appellant received SSA age-related retirement benefits as of November 2015 and provided SSA age-related benefit rates with FERS offset. Beginning November and December 2015, the SSA rate with FERS was \$949.60 and without FERS was \$578.20. Beginning December 2016, the SSA rate with FERS was \$952.40 and without FERS

³ *Order Remanding Case, M.B.*, Docket No. 05-0591 (issued August 8, 2005); Docket No. 06-1158 (issued October 2, 2007); Docket No. 11-272 (issued January 25, 2012).

⁴ Appellant requested modification of OWCP's March 28, 2000 LWEC determination, which OWCP denied by decision dated March 27, 2006. On October 2, 2007 the Board affirmed OWCP's March 27, 2006 decision. Docket No. 06-1158 (issued on October 2, 2007). Appellant sought modification several times thereafter and, by decisions dated March 13 and August 20, 2008, June 12 and November 18, 2009, and October 7, 2010, OWCP denied modification of the March 28, 2000 LWEC determination. Appellant appealed OWCP's October 7, 2010 decision to the Board, which the Board affirmed on January 25, 2012. Docket No. 11-272 (issued on January 25, 2012).

was \$579.90. Beginning December 2017, the SSA rate with FERS was \$971.40 and without FERS was \$591.40. Beginning December 2018, the SSA rate with FERS was \$998.50 and without FERS was \$608.60. Beginning December 2019, the SSA rate with FERS was \$1,014.50 and without FERS was \$617.60. Beginning December 2020, the SSA rate with FERS was \$1,027.60 and without FERS was \$625.60. Beginning December 2021, the SSA rate with FERS was \$1,088.10 and without FERS was \$662.50.

As of July 16, 2022 OWCP paid appellant net wage-loss compensation for partial disability in accordance with the March 28, 2000 LWEC determination in the amount of \$1,825.04 per 28-day pay period.⁵

Beginning July 17, 2022, OWCP adjusted appellant's net wage-loss compensation to \$896.18 per 28-day pay period to include the offset of her SSA age-related retirement benefits attributable to her federal service.⁶ It advised her that the amount of the offset was \$392.86 per 28-day pay period and notified her of this change by letter dated August 9, 2022.

In a FERS offset overpayment calculation worksheet dated August 16, 2022, OWCP used the information provided by SSA on July 13, 2022 to calculate the 28-day FERS offset for the relevant periods and calculated a total overpayment in the amount of \$31,420.42. It found that from November 1 through 30, 2015 appellant received an overpayment in the amount of \$367.32; from December 1, 2015 through November 30, 2016 appellant received an overpayment in the amount of \$4,481.29; from December 1, 2016 through November 30, 2017 appellant received an overpayment in the amount of \$4,482.28; from December 1, 2017 through November 30, 2018 appellant received an overpayment in the amount of \$4,572.53; from December 1, 2018 through November 30, 2019 appellant received an overpayment in the amount of \$4,691.65; from December 1, 2019 through November 30, 2020 appellant received an overpayment of \$4,788.97; from December 1, 2020 through November 30, 2021 appellant received an overpayment of \$4,837.25; and from December 1, 2021 through July 16, 2022 appellant received an overpayment in the amount of \$3,199.02.

In an August 16, 2022 preliminary overpayment determination, OWCP notified appellant that she had received an overpayment of compensation in the amount of \$31,420.42 because it had failed to reduce her wage-loss compensation payments for the period November 1, 2015 through July 16, 2022 by the portion of her SSA age-related retirement benefits attributable to her federal service. It explained each period in the FERS offset calculation and found a total overpayment of \$31,420.42. OWCP further advised appellant of its preliminary determination that she was without fault in the creation of the overpayment and requested that she complete an overpayment action request form and an overpayment recovery questionnaire (Form OWCP-20), and submit supporting financial documentation, including copies of income tax returns, bank account statements, bills, and canceled checks, pay slips, and any other records to support income and

⁵ Appellant's July 16, 2022 payment report reflected a gross amount of \$2,017.00 per 28-day pay period.

⁶ Appellant's August 13, 2022 payment report reflected a gross amount of \$1,481.00 per 28-day pay period, effective July 17, 2022.

expenses. Additionally, it notified her that she could request a final decision based on the written evidence or a prerecoupment hearing within 30 days.

By letters dated September 2 and 5, 2022, appellant requested that OWCP provide an explanation regarding the decrease in her gross compensation rate from \$2,017.00 to \$1,481.00 per 28-day pay period. She asserted that the reduction was in excess of the amount of the offset reflected in OWCP's August 9, 2022 correspondence.

On September 6, 2022 appellant requested a prerecoupment hearing regarding the reduction in her pay rate and possible waiver of recovery of the overpayment before a representative of OWCP's Branch of Hearings and Review. She requested waiver of recovery of the overpayment because she was found to be without fault in the creation of the overpayment.

OWCP thereafter received a completed Form OWCP-20 dated September 7, 2022, wherein appellant noted a total monthly income of \$1,814.18, which included \$918.00 in SSA benefits and \$896.18 in FECA wage-loss benefits. Appellant also reported monthly expenses of \$1,930.00 and that she had cash on hand of \$800.00, a checking account balance of \$34,932.90, a savings account balance of \$96,424.73, and stocks and bonds valued at \$2,000.00, for total assets of \$134,187.63. She provided financial documentation, including her bank and credit card statements, utility, property tax, student loan, and car insurance bills, an SSA benefit statement, and a 2015 tax return. Appellant also submitted a statement wherein she asserted that she purchased a more expensive home and relied to her detriment on the income that she was overpaid.

A telephonic hearing was conducted on January 18, 2023 before a representative of OWCP's Branch of Hearings and Review. At the conclusion of the hearing, he issued a summary decision, contained in the hearing transcript and attached to a decision dated January 31, 2023. The hearing representative found that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$31,420.42 for the period November 1, 2015 through July 16, 2022, for which she was without fault. He further found that OWCP made an error in the amount of ongoing payments beginning July 17, 2022, which resulted in an underpayment to appellant. The hearing representative remanded the case to OWCP to correct the pay rate and then address waiver and recovery of the overpayment.⁷

By decision dated April 27, 2023, OWCP finalized its preliminary overpayment determination, finding that appellant had received an overpayment of compensation in the amount of \$31,420.42 for the period November 1, 2015 through July 16, 2022, because she concurrently received SSA age-related retirement benefits and FECA wage-loss compensation benefits without an appropriate offset. It also found that she was without fault in the creation of the overpayment, but denied waiver of recovery of the overpayment because the evidence of record was insufficient to establish that recovery of an overpayment would defeat the purpose of FECA or would be against equity and good conscience. OWCP noted that the evidence of record established that

⁷ In an August 29, 2022 letter of medical necessity, Dr. Rebecca McKown, a family physician, indicated that appellant was unable to work in any capacity. In a January 17, 2023 letter, appellant again requested modification of OWCP's March 28, 2000 LWECD determination due to a deterioration in her medical condition. In support of her request, she submitted a January 13, 2023 narrative letter by Dr. McKown. In his January 31, 2023 decision, OWCP's hearing representative further instructed OWCP to address her requests for modification of the LWECD determination.

appellant had assets in excess of the resource base of \$6,200.00. It further found that she was entitled to a compromise of the debt due to her age and ability to repay the debt. OWCP suspended the accrual of interest and fees on appellant's debt and reduced the principle of the debt to \$18,000.00. It again found that appellant was without fault in the creation of the overpayment and required recovery of the overpayment by deducting \$92.31 from her continuing compensation payments, every 28 days.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his or her duty.⁸ Section 8116 limits the right of an employee to receive compensation. While an employee is receiving compensation, he or she may not receive salary, pay, or remuneration of any type from the United States.⁹

Section 10.421(d) of OWCP's implementing regulations requires that OWCP reduce the amount of compensation by the amount of any SSA age-related retirement benefits that are attributable to the employee's federal service.¹⁰ FECA Bulletin No. 97-09 states that FECA benefits have to be adjusted for the FERS portion of SSA benefits because the portion of the SSA benefit earned as a federal employee is part of the FERS retirement package, and the receipt of FECA benefits and federal retirement concurrently is a prohibited dual benefit.¹¹

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$31,420.42 for the period November 1, 2015 through July 16, 2022, for which she was without fault, because she concurrently received FECA wage-loss compensation and SSA age-related retirement benefits, without an appropriate offset.¹²

The evidence of record indicates that, while appellant was receiving compensation for wage-loss compensation benefits under FECA, she was also receiving SSA age-related retirement benefits based upon his federal service. A claimant cannot receive both compensation for wage-loss compensation benefits under FECA and SSA age-related retirement benefits attributable to federal service for the same period.¹³ The information provided by SSA established that appellant

⁸ 5 U.S.C. § 8102(a).

⁹ *Id.* at § 8116.

¹⁰ 20 C.F.R. § 10.421(d); *see D.F.*, Docket No. 21-0652 (issued January 25, 2023); *S.M.*, Docket No. 17-1802 (issued August 20, 2018); *L.J.*, 59 ECAB 264 (2007).

¹¹ FECA Bulletin No. 97-09 (issued February 3, 1997); *see also C.W.*, Docket No. 22-1012 (issued January 20, 2023); *N.B.*, Docket No. 18-0795 (issued January 4, 2019).

¹² *Y.H.*, Docket No. 23-0444 (issued August 23, 2023); *R.C.*, Docket No. 19-0845 (issued February 3, 2020); *A.F.*, Docket No. 19-0054 (issued June 12, 2019).

¹³ *Id.*

received SSA age-related retirement benefits that were attributable to federal service during the period November 1, 2015 through July 16, 2022. Consequently, the fact of overpayment has been established.

To determine the amount of the overpayment, the portion of SSA's benefits that were attributable to federal service must be calculated. OWCP received documentation from SSA with respect to the specific amount of SSA age-related retirement benefits that were attributable to federal service. SSA provided its rate with FERS and without FERS for specific periods from November 1, 2015 through July 16, 2022. OWCP provided its calculations for each relevant period based on SSA's worksheet and determined that she received an overpayment in the amount of \$31,420.42.

The Board has reviewed OWCP's calculation of benefits received by appellant for the period November 1, 2015 through July 16, 2022 and finds that an overpayment of compensation in the amount of \$31,420.42 was created.¹⁴

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA provides that an individual who is without fault in creating or accepting an overpayment is still subject to recovery of the overpayment unless adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.¹⁵ Thus, a finding that appellant was without fault does not automatically result in waiver of the overpayment. OWCP must then exercise its discretion to determine whether recovery of the overpayment would defeat the purpose of FECA or would be against equity and good conscience.¹⁶

Section 10.436 of OWCP's implementing regulations provides that recovery of an overpayment would defeat the purpose of FECA if such recovery would cause hardship because the beneficiary from whom OWCP seeks recovery needs substantially all of his or her current income (including compensation benefits) to meet current ordinary and necessary living expenses and the beneficiary's assets do not exceed a specified amount as determined by OWCP.¹⁷ An individual is deemed to need substantially all of his or her current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.¹⁸ Also, assets must not exceed a resource base of \$6,200.00 for an individual or \$10,300.00 for an individual with a spouse or dependent plus \$1,200.00 for each additional

¹⁴ See *P.M.*, Docket No. 21-0915 (issued December 14, 2021); *R.F.*, Docket No. 20-0159 (issued October 15, 2020); see *D.C.*, Docket No. 17-0559 (issued June 21, 2018).

¹⁵ 5 U.S.C. § 8129(a)-(b).

¹⁶ *D.H.*, Docket No. 19-0384 (issued August 12, 2019); *V.H.*, Docket No. 18-1124 (issued January 16, 2019); *L.S.*, 59 ECAB 350 (2008).

¹⁷ 20 C.F.R. § 10.436(a)(b).

¹⁸ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Final Overpayment Determinations*, Chapter 6.400.4a(3) (September 2020).

dependent.¹⁹ An individual's liquid assets include, but are not limited to cash, the value of stocks, bonds, saving accounts, mutual funds, and certificate of deposits.²⁰ Nonliquid assets include, but are not limited to, the fair market value of an owner's equity in property such as a camper, boat, second home, furnishings/supplies, vehicle(s) above the two allowed per immediate family, retirement account balances (such as Thrift Savings Plan or 401(k)), jewelry, and artwork.²¹

Section 10.437 of OWCP's implementing regulations provides that recovery of an overpayment is considered to be against equity and good conscience when an individual who received an overpayment would experience severe financial hardship attempting to repay the debt; and when an individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.²² OWCP's procedures provide that, to establish that a valuable right has been relinquished, an individual must demonstrate that the right was in fact valuable, that he or she was unable to get the right back, and that his or her action was based primarily or solely on reliance on the payment(s) or on the notice of payment.²³

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied waiver of recovery of the overpayment of compensation.²⁴

As OWCP found appellant without fault in the creation of the overpayment, waiver must be considered. As noted above, even if a claimant is found without fault in the creation of the overpayment, recovery of the overpayment is still required unless adjustment or recovery of the overpayment would defeat the purpose of FECA or would be against equity and good conscience.²⁵

The Board finds that appellant has not established that recovery of the overpayment would defeat the purpose of FECA because she has not shown both that he needs substantially all of her current income to meet ordinary and necessary living expenses and that her assets do not exceed the allowable resource base. In the Form OWCP-20, appellant reported cash on hand of \$800.00, a checking account balance of \$34,932.90, a savings account balance of \$96,424.73, and stocks and bonds valued at \$2,000.00, for total assets of \$134,187.63.

As noted above, in determining whether recovery of the overpayment would defeat the purpose of FECA, OWCP considers whether assets exceed a resource base of \$6,200.00 for an

¹⁹ *Id.* at Chapter 6.400.4a(2).

²⁰ *Id.* at Chapter 6.400.4b(3).

²¹ *Id.* at Chapter 6.400.4b(3)(a), (b).

²² 20 C.F.R. § 10.437; *see E.H.*, Docket No. 18-1009 (issued January 29, 2019).

²³ *Supra* note 18 at Chapter 6.400.4c(3).

²⁴ *J.T.*, Docket No. 21-0696 (issued August 7, 2023); *A.C.*, Docket No. 18-1550 (issued February 21, 2019).

²⁵ *Supra* note 22.

individual.²⁶ Accordingly, the Board finds that appellant, who reported up to \$134,187.63 in assets, has not met the standard for waiver of recovery of the overpayment because her assets exceed the allowable resource base.²⁷ Because appellant has not met the second prong of the two-prong test of whether recovery of the overpayment would defeat the purpose of FECA, it is not necessary for OWCP to consider the first prong of the test, *i.e.*, whether she needs substantially all of her current income to meet ordinary and necessary living expenses.²⁸

The Board also finds that appellant has not established that she was entitled to waiver on the basis that recovery of the overpayment would be against equity and good conscience. Appellant argued that she relied to her detriment on the overpayment to purchase a more expensive home. The Board has held that conversion of a liquid asset into real or personal property does not constitute a loss.²⁹ Thus, OWCP properly found that appellant did not establish that recovery would be against equity and good conscience. Appellant has not shown, for the reasons noted above, that she would experience severe financial hardship in attempting to repay the debt or that she has relinquished a valuable right or changed her position for the worse in reliance on the payments which created the overpayment.³⁰

Because appellant has not established that recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience, the Board finds that OWCP properly denied waiver of recovery of the overpayment.³¹

LEGAL PRECEDENT -- ISSUE 3

The Board's jurisdiction over recovery of an overpayment is limited to reviewing those cases where OWCP seeks recovery from continuing compensation under FECA.³²

Section 10.441(a) of OWCP's regulations³³ provides in pertinent part:

"When an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to OWCP the amount of the overpayment as soon as the error is discovered or his or her attention is called to same. If no refund

²⁶ *Supra* note 19.

²⁷ *S.W.*, Docket No. 20-0363 (issued November 23, 2020); *H.F.*, Docket No. 17-0101 (issued September 5, 2017).

²⁸ *J.T.*, *supra* note 24; *S.R.*, Docket No. 20-1416 (issued September 8, 2020); *M.H.*, Docket No. 19-1497 (issued September 9, 2020).

²⁹ *Supra* note 18 at Chapter 6.400(4)(c)(3)) (September 2020); *J.B.*, Docket No. 15-1043 (issued August 6, 2015); *See O.C.*, Docket No. 09-0483 (issued October 8, 2009); *Sherry A. Hunt*, 49 ECAB 467, 473 (1998).

³⁰ *See B.C.*, Docket No. 19-0629 (issued June 2, 2020); *William J. Murphy*, 41 ECAB 569, 571-72 (1989).

³¹ *S.W.*, *supra* note 27.

³² 20 C.F.R. § 10.441; *see R.L.*, Docket No. 23-0110 (issued July 28, 2023); *M.P.*, Docket No. 18-0902 (issued October 16, 2018).

³³ *Id.* at § 10.441(a).

is made, OWCP shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual, and any other relevant factors, so as to minimize any hardship.”³⁴

ANALYSIS -- ISSUE 3

The Board finds that OWCP properly required recovery of the overpayment by deducting \$92.31 from appellant’s continuing compensation payments, every 28 days.

OWCP gave due regard to the financial information submitted, as well as the factors set forth in 20 C.F.R. § 10.441, including the compromised overpayment amount of \$18,000.00, and found that this method of recovery would minimize resulting hardship.³⁵ Therefore, it properly required recovery of the overpayment by deducting \$92.31 from appellant’s continuing compensation payments, every 28 days.

LEGAL PRECEDENT -- ISSUE 4

FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from a personal injury sustained while in the performance of duty.³⁶ If the disability is total, the United States shall pay the employee during the period of total disability the basic compensation rate of 66 2/3 percent of his or her monthly pay. A disabled employee is entitled to an augmented compensation rate of 75 percent if he or she has one or more dependents.³⁷

OWCP accepts a claim, it has the burden of proof to establish that the disability has ceased or lessened before it may terminate or modify compensation benefits.³⁸ An injured employee who is either unable to return to the position held at the time of injury or unable to earn equivalent wages, but who is not totally disabled for all gainful employment, is entitled to compensation computed on his or her LWEC.³⁹

ANALYSIS -- ISSUE 4

The Board finds that this case is not in posture for decision regarding whether OWCP properly determined appellant’s pay rate for compensation purposes, effective July 17, 2022.

³⁴ *Id.*; see *C.M.*, Docket No. 19-1451 (issued March 4, 2020).

³⁵ *M.S.*, Docket No. 20-0068 (issued May 14, 2021); *M.B.*, Docket No. 20-1578 (issued March 25, 2021).

³⁶ 5 U.S.C. § 8102(a).

³⁷ *E.B.*, Docket No. 19-1571 (issued December 31, 2020); *R.G.*, Docket No. 18-1251 (issued November 26, 2019); *O.R.*, 59 ECAB 432 (2008); *id.* at §§ 8105(a) and 8110(b).

³⁸ *S.C.*, Docket No. 19-1680 (issued May 27, 2020); *Betty F. Wade*, 37 ECAB 556, 565 (1986).

³⁹ 20 C.F.R. §§ 10.402, 10.403.

As of July 16, 2022 OWCP paid appellant net wage-loss compensation for partial disability, in accordance with the March 28, 2000 LWEC determination, in the amount of \$1,825.04 per 28-day pay period. Beginning July 17, 2022, it adjusted her net wage-loss compensation to \$896.18 per 28-day pay period. OWCP's hearing representative issued a summary decision, contained in the hearing transcript and attached to a decision dated January 31, 2023, finding that OWCP made an error in the amount of ongoing payments beginning July 17, 2022, which resulted in an underpayment to appellant. He remanded the case, in part, to OWCP to correct the pay rate. OWCP, however, failed to take any further action in developing appellant's pay rate for compensation purposes.

Accordingly, the Board finds that the case must be remanded to determine the appropriate compensation amount and any resultant underpayment and provide an explanation to appellant of its calculations.⁴⁰ Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$31,420.42 for the period November 1, 2015 through July 16, 2022, for which she was without fault, because she concurrently received FECA wage-loss compensation and SSA age-related retirement benefits, without an appropriate offset. The Board further finds that OWCP properly denied waiver of recovery of the overpayment and properly required recovery of the overpayment by deducting \$92.31 from her continuing compensation payments, every 28 days. The Board also finds that this case is not in posture for decision regarding whether OWCP properly determined appellant's pay rate for compensation purposes effective July 17, 2022.

⁴⁰ See *M.B.*, Docket No. 08-460 (issued June 18, 2008); *Cf. P.J.*, Docket No. 21-1107 (issued January 31, 2022) (where the Board remanded the claim to OWCP for clarification of the amount and period of an overpayment of compensation); see *R.H.*, Docket No. 08-2025 (issued July 20, 2009).

ORDER

IT IS HEREBY ORDERED THAT the April 27 and January 31, 2023 decisions of the Office of Workers' Compensation Programs are affirmed in part and set aside in part. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: March 11, 2024
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board